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IN THE

Supreme Court of the United States

No. 225 October Term, 1940

In the matter of

MORTON DAVID BLUESTONE,

Petitioner.

Brief in Opposition to Petition for Writ of Certiorari

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The Supreme Court of Pennsylvania, by its counsel John W. Kephart and Robert T. McCracken, answers appellant's Petition for Writ of Certiorari and files its brief on the jurisdictional and legal questions involved, as follows:

HISTORY OF ADMISSION TO THE BAR IN PENNSYLVANIA

In 1722, following in part the practice of the English courts, an Act of Assembly was passed in the Province of Pennsylvania which provided:

> "That there may be a competent number of persons of an honest disposition, and learned in the law, admitted by the Justices of the said respective courts, to practice as attorneys there, who shall behave themselves justly and faithfully in their practice . . ." (1 Smith Laws 145).

Admission was further treated by the legislature in a later act recognizing that:

> "The judges of the several courts of record of this Commonwealth shall respectively have power to admit a competent number of persons of an honest disposition [etc.]". (Act of April 14, 1834, P. L. 341, 354).

Under these and sundry other acts, as well as the inherent common law power of the courts, the courts of this Commonwealth have always exercised exclusive jurisdiction over the office of attorney-at-law, including the admission of properly qualified and well disposed persons of character and ability to fill that office. Prior to the year 1903, there was no uniform method of admission to the bar throughout the state. In a great many counties of the Commonwealth, examining boards were appointed by the courts of common pleas to examine candidates for the bar as to their educational qualifications, reputation, character, disposition and fitness to register as law students and pursue the course of study duly prescribed in the county. Thereafter the applicant was again required to submit to an examination, at that time to determine his knowledge of the law, and an investigation was again conducted to determine his reputation, character, disposition and fitness to fill the office of attorney-at-law.

At no time from 1722 to 1903 did the Supreme Court of Pennsylvania assume any control over the office of attorney or those who desired to register for the study of law in the various counties of the Commonwealth. The decisions of the several courts of common pleas of the several counties were treated as conclusive on this court, except in proceedings to protect the right to practice acquired by the incumbent attorney or to protect the public and the bar when that right was abused. Attorneys were admitted to the Supreme

Court on motion, generally after two years' practice in the county courts.

In 1903, pursuant to a memorial presented by the Pennsylvania State Bar Association to the Supreme Court, this Court, acting under its inherent power and the Constitution of Pennsylvania, created the State Board of Law Examiners, appointed the members thereof, and adopted rules governing admission to the bar of the Court, prescribing uniform examinations and satisfactory proof as to character. The duties of this Board have been to enforce the Supreme Court's rules and adopt regulations governing registration of law students, study of law and admission to the bar of the Supreme Court. (The applicable rules of the Supreme Court and regulations of the State Board are filed herewith as "Appendix 'A' ".) However, this did not preclude the courts of common pleas from continuing their practice of admission to the local bar. Although a certificate from the State Board of Law Examiners was conclusive on the question of the applicant's knowledge of the law, the admission in the courts of the several counties of the state of persons passing the State Board examinations has remained subject to the orders of the courts of common pleas and the recommendations of the local boards set up by the local courts. Notwithstanding the general practice throughout the state that a prerequisite for admission to the local bar is the passing of an examination conducted by the State Board of Law Examiners and admission to the Supreme Court, each local court still retains the power to admit any applicant to practice law before it.

Persons desiring to practice law before the Supreme Court of Pennsylvania, except lawyers from other states, are now required to register as law students with the State Board of Law Examiners. The rules of the Supreme Court

as to such registration require a degree from an approved college, or the passing of an examination on pre-legal studies. Rule 10 provides (See Appendix "A", page 9) :

> "No certificate of registration as a law student shall be issued by the state board until it is satisfied as to the applicant's fitness and general qualifications. . . . ."

It is specifically provided by Rule 9 (See Appendix "A", page 8) that:

> "where the county board certifies to the state board that an applicant does not possess the necessary fitness or general qualifications (other than scholastic), the state board, in its discretion, may hold a hearing, by a committee or otherwise; to which the applicant, one or more representatives of the county board, and, if the state board deem it proper, others shall be invited to attend, so that the state board, before passing on the question whether it shall approve or disapprove the findings of the county board, may interview the applicant personally and hold such other investigation as to it may seem proper. If the state board approves the findings of the county board and the applicant appeals to this court, and if such appeal is allowed by this court, it may either decide the matter on the record or hear, by committee or otherwise, the applicant and members of the local and state boards, or any of them, as the court may deem best."

In the case before your Honorable Court the appellant filed his application for registration as a law student, accompanied by the necessary questionnaires, with the Secretary of the State Board. This was referred to the secretary of the board of Allegheny County. The local board conducted its examination in accordance with the procedure provided by the State Board in conformity with the rules

of the Supreme Court. Two of its members personally interviewed the appellant, made a full investigation "of his fitness and general qualifications (other than scholastic)", and rendered a report and recommendation to the county board. After the hearing before these two members, the entire county board conducted a hearing, at which testimony was taken. The applicant was accorded every opportunity to show his fitness to become a member of the bar, and, after a full hearing of the case, the county board rejected the applicant's petition to register as a law student. This report was forwarded to the State Board of Law Examiners which in turn, after a full review of the record, affirmed the decision of the county board and declined to register the applicant.

The applicant then petitioned the Supreme Court to allow an appeal, and this Court, as stated in the order, after a full examination of the record including the facts, found that there was sufficient evidence to warrant the county board in rejecting his application for registration and made the order herein complained of.

The procedure in all cases of registration, as well as admission to the bar, requires the application to be filed with the State Board, which refers it to the county board for action. The county board certifies its action to the State Board, and there the complete record is lodged, including the testimony that is taken, all questionnaires and answers, all correspondence and statements in relation to the particular application, and the results of all independent investigations made by the county board and the State Board. This record, while not in the possession of the Prothonotary, is nevertheless a part of the records of the Supreme Court in that the State Board of Law Examiners is an arm of the Court and its records are always available to the judges of that Court.

In all appeals that come to the Supreme Court from the rejection of an application for registration or admission, this record is laid before the Court for its consideration. It is the record referred to in the Supreme Court's Rule 9. The only part of the record that is lodged in the Prothonotary's Office of the Supreme Court is the petition of the applicant for appeal and the order of the Court made thereon.

Pursuant to the above procedural requirements, the present applicant was accorded a full hearing before the county board. A careful investigation was made to determine his fitness. The county board rejected his application. The testimony and all letters and matters in connection therewith in the possession of the local board were submitted to the State Board, which, after careful consideration, sustained the action of the county board. The entire record of the action of the State Board and the county board was reviewed by the members of the Supreme Court, who sustained the conclusion that the applicant is unworthy to become a member of the bar.

LEGAL OBJECTIONS TO THE PETITION

1. The Supreme Court of Pennsylvania takes the position that, historically and basically, admission to practice law in the State of Pennsylvania is solely within the jurisdiction of the courts of that state. This includes not only the actual admission but the registration of persons desiring to study law with the several official boards of the state. A citizen of this state or of the United States has no inherent or constitutional right to practice law or to register with the boards of this state for that purpose. The appellant in this case was not denied due process in the refusal to register him, as he had no property right to registration.

2. The proceedings before the several boards afforded all the process that the state has adopted to determine the fitness of a person to study law for the purpose of becoming a member of the bar of the Supreme Court of Pennsylvania. There was no process denied this applicant, as he had a full and fair hearing before an impartial tribunal, and a judicial review appropriate to the nature of the proceedings. Neither the Supreme Court of Pennsylvania nor its boards are required to give a reason for refusal to register a student after he has had a full hearing before the board.

3. The applicant has assumed a reason for his rejection which is merely his own conjecture.

ARGUMENT

1. Due Process Clause Inapplicable.

In support of the first legal objection above stated, we wish to emphasize that the case before your Honorable Court is not one of disbarment, but of an application to register as a law student for admission to the bar of the State Supreme Court, through its duly constituted authority, the State Board of Law Examiners. Rejection from registration does not prevent a person from studying law—the applicant at present is a student at the Duquesne University Law School.

> "The power of a State to prescribe the qualifications for admission to the bar of its own courts is unaffected by the fourteenth amendment, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe:" *Bradwell v. The State*, 16 Wall. 130.

While this statement is from the syllabus, we think it is a correct conclusion from the opinion. The Bradwell case was followed by *In re Lockwood, Petitioner*, 154 U. S. 116, where it was held that citizenship did not give the right, under the Fourteenth Amendment, to admission to practice law.

In the more recent case of *Keeley v. Evans et al.*, 271 Fed. 520, where the Supreme Court of the State of Oregon rejected an applicant for admission, the United States Courts refused to interfere, holding that a Federal Court has no power to review "the action of the state Supreme Court in denying a license to practice law in the state." Your Honorable Court dismissed the appeal: 257 U. S. 667.

In 1938 your Honorable Court had occasion to review the action of the Circuit Court of Appeals of the Ninth

Circuit, in deciding that the right to practice law was not guaranteed by the Federal Constitution. The Circuit Court stated:

> "We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws:" *Mitchell v. Greenough et al.*, 100 F.(2d) 184, at page 185.

Your Honorable Court refused to allow a petition for a write of certiorari: 306 U. S. 659.

In England the power to admit attorneys was vested in the courts by statute 4 Henry IV, chap. 18. The practice in that country has long been to entrust complete control of admissions to the bar itself to the Inns of Court. The benchers alone may recommend admissions, and the courts will in no way interfere with their recommendations, except that the judges may intervene as visitors of the Inns of Court: *In re O'Brien's Petition*, 79 Conn. 46, 63 Atl. 777.

In this country, the power to regulate the admission, discipline or disbarment of attorneys has always vested in common law courts such as those of Pennsylvania. *Ex parte Secombe*, 19 How. 9; *Olmsted's Case*, 292 Pa. 96. The history of the exercise of this power in Pennsylvania has been traced in part in the latter case.

The office or profession of attorneys, and the law relating thereto, are peculiarly different from all other offices, occupations or professions, especially because attorneys are both agents of their clients and officers of the court: *Ex parte Garland*, 4 Wall. 333, 378; *Case of Austin and others*, 5 Rawle (Pa.) 191, 203; *In re Samuel Davies*, 93 Pa. 116, 120.

By admitting an attorney to the bar, the court presents him to the public as worthy of its confidence in all his professional duties and relations: *In re Samuel Davies*, supra, at page 121; *Ex parte Garland*, supra, at page 378.

There is a fundamental distinction between admission to the bar and removal or discipline after admission. Once having entered upon the office of attorney, the practitioner has a vested property right which can be taken from him only upon notice and hearing in conformity with the due process clauses of the Federal and State Constitutions: *Montgomery County Bar Ass'n v. Rinalducci*, 329 Pa. 296, 299.

In *In re O'Brien's Petition*, 79 Conn. 46, 63 Atl. 777, supra, there is a well reasoned opinion which holds that no property right exists in a person who applies for admission to the bar (in this case to study law or be registered as a student for that purpose) prior to his admission to the bar and that such a candidate has no right protected by the Fourteenth Amendment.

There are numerous decisions supporting the views herein expressed. In addition to the above citations we might refer to the language in *Ex parte Secombe*, 19 How. 9, supra, where Chief Justice Taney stated, at page 13:

> "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

See also *Bergeron, Petitioner*, 220 Mass. 472; *Matter of Ole Mosness*, 39 Wis. 509; Note in *10 L. R. A. (N. S.) 289; Cohen v. Wright*, 22 Cal. 293.

2. DUE PROCESS AFFORDED.

On the second legal objection, there is no averment or allegation that the rules and regulations relative to registration and admission to the bar, as set forth above and in Appendix "A", have not been complied with. On the contrary, as shown by the history of the case, there was full compliance. They were strictly followed and the applicant received all the protection afforded by the process which the State has adopted to determine the fitness of a person to become a member of the Supreme Court's bar. Compare *Local Government Board v. Arlidge* [1915] A. C. 120.

The applicant makes some complaint that he was not told the reason for his rejection. Under the rules as interpreted by the Supreme Court of Pennsylvania no reasons are required to be given. The several boards are required to make a full, complete and impartial investigation. Their sources of information are very frequently confidential. The information is investigated to ascertain the truth. To make any disclosure of such information or its sources would often lead to unfortunate results and would impede the action of the various boards in determining whether the applicant is fit to hold the office of attorney.

Even assuming that the due process clause were applicable to such proceeding, there was nothing in the procedure prescribed or herein followed which denies the applicant of the necessary process.

In every case involving the question of due process the subject matter must be considered, and proceedings involving the office of attorney are not to be treated as similar to other proceedings: *Ex parte Wall*, 107 U. S. 265.

The procedure followed in the State of Pennsylvania has been sanctioned by long usage, not only in this country but also in England. In such a case, of course, there has

been no deprivation of due process. *Murray's Lessee et al. v. Hoboken Land & Improvement Co.*, 18 How. 272.

Therefore, it is unnecessary for the court or any of the boards here involved to state its reasons for rejecting an applicant. The writing of an opinion is unnecessary for due process, and many tribunals make orders without stating their reasons or rendering an opinion. A recent illustration is found in *McGrath v. Nolan*, 83 F.(2d) 746 (C. C. A. 9th, 1936), where the court held that it was unnecessary to write an opinion on a decree dismissing a libel for failure to state a cause of action.

The applicant does not complain that he was denied notice or an opportunity to be heard, nor does he state any facts relating to the impartiality of the tribunal. All of the requirements of due process have therefore been fulfilled.

3. Record Insufficient to Establish That Applicant Was Rejected for the Reasons He Asserts.

There is no basis for the applicant's assumption that he was rejected solely for the reasons set forth in his petition. Under the procedure above described the entire character of the applicant was studied by the boards and the Supreme Court. It was on the basis of the entire record that he was rejected.

There is nothing in the applicant's petition to establish that he was deprived of his rights of speech or property.

Your Honorable Court is therefore respectfully requested to dismiss the petition for writ of certiorari.

Respectfully submitted:

John W. Kephart
Robert T. McCracken